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## **Towers, Trees, and Transmission Lines: The Fight Between Property Rights, Power, and Profit**

*By Meredyth Merrow\**

### **Abstract**

This paper explores the ethical challenges raised by the controversial Northern Pass Project (“Northern Pass” or “the Project”) that is intended to span 192 miles, from the United States/Canadian border through New Hampshire. In analyzing the complex issues on both sides of this project, I weigh the competing accounts of the project’s potential benefits and impacts, analyze the socioeconomic impacts on the regions along the proposed route, and highlight the shared values of Northern New Hampshire residents, as they relate to their land, by appealing to first-person accounts of individuals along the affected region. Finally, I address environmental harm by analyzing both the physical and intangible injuries brought about by the proposed transmission line, and reflect on our societal values as they relate to classifying crime and environmental justice.

I seek to show that the Northern Pass Project, in its proposed construction and use, contains a combination of elements of criminal theft and private and public nuisance. New Hampshire citizens will be deprived of their use and enjoyment of their property—and their opportunities for local future cleaner-energy options—while simultaneously experiencing the forced entrance of undesired obstructions to untouched land. In this showing, I argue that criminal theft, should include an evaluation of the subjective intangible harms incurred by Northern New Hampshire residents. I contend that the traditional harm-benefit analysis does not tip towards the Northern Pass’s construction after balancing the competing public goods. In this case, the construction of the Northern Pass offers the potential public good of more-reliable, cleaner power, and a reduction in greenhouse gas emissions (GHGs) for southern New England, but does so in seeming contradiction to the public goods of conserving unadulterated land for generations to come and of preserving private property rights. Further, this project encourages bad environmental policy, essentially stating that the environmental protection of out-of-state residents should be paid for by the poorest in the region. I hope to show that the Northern Pass is more harmful than just unsightly aesthetics on private landowners in Northern New Hampshire, but also infringes on New Hampshire residents’ fundamental liberties by desecrating the sacred, unspoiled land of the Great North Woods.

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I went to the woods because I wished to live deliberately, to front only the essential facts of life, and see if I could not learn what it had to teach, and not, when I came to die, discover that I had not lived.<sup>1</sup>

– Henry David Thoreau

Man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life.<sup>2</sup>

– Justice Oliver Wendell Holmes

## Introduction

New Hampshire, known as the “Granite State,” is often hailed as “an outdoor paradise,” home to the “magnificent White Mountains and Mount Washington, the highest mountain in the northeast, and myriad lakes, ponds, rivers, and, the sea.”<sup>3</sup> New Hampshire is defined by its quaint towns and large expanses of untouched wilderness.<sup>4</sup> It is home to more than 500 species of vertebrate animals, including twenty-seven endangered species and fourteen threatened species.<sup>5</sup> It exists as a small piece of paradise in the Northeastern United States, where residents from busy cities in Massachusetts, New York, and Connecticut can escape the noise, traffic, and pollution for mountains, trees, rivers and streams.

As the need for electricity increases due to an ever-increasing population, projects offering cleaner power options are proving necessary for national sustainable growth. Canadian Hydropower is advertised as “clean” and “green,”<sup>6</sup> and the Northern Pass Project is marketed as bringing “clean, affordable energy” to the New England region from Canadian hydropower facilities.<sup>7</sup> In doing so, however, the project will permanently scar the scenic landscape of New Hampshire, and arguably, the livelihood of the local communities affected by the project. Although the project sponsors, Hydro-Quebec and Eversource, maintain that the transmission line will provide a new source of reliable energy while

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1. Henry David Thoreau, *Where I Lived, and What I Lived For*, in WALDEN (1854). Thoreau was born in Concord, Massachusetts, and wrote of the beauty of the New England natural landscape.

2. PROPERTY AND COMMUNITY 121 (Gregory S. Alexander & Eduardo M. Penalver eds., Oxford Univ. Press, Inc. 2010).

3. *New Hampshire*, DISCOVER NEW ENGLAND, <http://www.discovernewengland.org/about-new-england/new-hampshire> [https://perma.cc/XD3N-ZRS8].

4. *Id.*

5. *Species Occurring in New Hampshire*, N.H. FISH AND GAME DEP'T, <http://www.wildlife.state.nh.us/wildlife/species-list.html> [https://perma.cc/W87J-G853].

6. Hydro-Quebec, one of the Northern Pass sponsors, markets Canadian hydropower as clean and green.

7. *Northern Pass Project Overview*, N. PASS TRANSMISSION, LLC, <http://www.northernpass.us/project-overview.htm> [https://perma.cc/3PME-2DZS].

decreasing carbon emissions,<sup>8</sup> New Hampshire landowners, business owners, and numerous environmental organizations overwhelmingly oppose the project. These groups argue that the line will permanently deface the state's natural landscape, scenic roads, and rob its citizens of their use and enjoyment of their land.<sup>9</sup> Because "the first 140 miles of the line is high-voltage direct current, New Hampshire residents, businesses and power suppliers cannot "plug into" the line to obtain or sell electric power."<sup>10</sup> Grassroots groups of concerned citizens argue that the Northern Pass "would effectively turn New Hampshire into a glorified extension cord" as Northern New Hampshire residents will bear all of the burdens, and receive none of the benefits, from its construction.<sup>11</sup>

My argument proceeds as follows: In Part I, I introduce the Northern Pass Project and discuss its history. Part II evaluates the project's "green" promises and Hydro-Quebec's history with the Pessamit Innu. In this evaluation, I conclude that the Northern Pass is not as environmentally friendly as advertised. Parts III and IV discuss the socioeconomic impacts of the project and what is at stake for North Country residents. Parts V through VII address the legal questions surrounding the project, first by identifying the victim, then defining environmental harm in this context, and finally, evaluating the project through the lens of criminal theft and nuisance torts. I conclude that the Northern Pass intentionally takes the property of New Hampshire residents, with the intent to deprive the owners of its possession, while also subjecting them to the unsightly permanence of the transmission line's towers, creating a combination of the two crimes. In balancing the potential benefits of the project's environmental initiatives with the projected harms to New Hampshire residents, I resolve that the project should not be constructed.

### **What is the Northern Pass Project?**

The Northern Pass was proposed on October 14, 2010, when Northern Pass Transmission, LLC applied to the United States Department of Energy ("DOE") for a presidential permit to construct a 192-mile, high-voltage, electric transmission line that would run from the United States/Canadian border through Deerfield, New Hampshire, bringing "clean energy" to the New England power grid.<sup>12</sup> The purpose of the project is "to build and operate a participant-funded

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8. *Id.*

9. *About, NO TO N. PASS*, <http://www.notonorthernpass.com/about/> [https://perma.cc/9583-EQQ4]. Sixty-four organizations, including The Appalachian Mountain Club, Conservation Law Foundation, Conservation New Hampshire, and Sierra Club oppose the project. Thirty of the thirty-one communities affected by the Northern Pass oppose the project. *Id.*

10. *Resources, NO TO N. PASS*, <http://www.notonorthernpass.com/resources/> [https://perma.cc/6CDL-DUQ2].

11. *Id.*

12. NORTHERN PASS FINAL ENVIRONMENTAL IMPACT STATEMENT (hereinafter N. PASS FEIS), § 1.2, at 40 (Aug. 2017), *available at* [http://media.northernpasseis.us/media/EIS-0463-FEIS-v1\\_2.pdf](http://media.northernpasseis.us/media/EIS-0463-FEIS-v1_2.pdf) [https://perma.cc/P68Y-B5RC].

electric transmission line to deliver 1,090 megawatts of low carbon, nonintermittent power (approximately 98 percent hydropower) from Quebec to southern New Hampshire to serve the New England region.”<sup>13</sup> The New England region is comprised of six U.S. states: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

Because New England does not have indigenous supplies of natural gas, it depends on importation.<sup>14</sup> The Federal Energy Regulatory Commission (“FERC”) and the project sponsors maintain that “access to this low-cost energy resource will help diversify [New England’s] power supply and keep pace with the rising demand for energy.”<sup>15</sup> Further, the renewable power has the potential to reduce carbon dioxide emissions by up to 3.2 million tons a year.<sup>16</sup>

Hydro-Quebec and Eversource claim that the Northern Pass will be “the single most impactful clean energy project for [the New England] region.”<sup>17</sup> According to the project sponsors, hydropower from Canada is a low-GHG-energy option, “similar to [that] of wind energy” which emits GHGs “five times less than solar, fifty times less than natural gas, and seventy times less than coal.”<sup>18</sup> Notwithstanding the energy benefits, the sponsors also note that there will be many additional benefits to the project, including: “2,600 new jobs during construction, \$62 million annual energy cost savings for New Hampshire consumers, \$30 million in additional state and local tax revenue, \$5,000 acres dedicated for preservation, recreational activities, and other mixed uses that are important to the North Country’s future, and \$200 million Forward NH Fund will provide support for economic development programs, clean energy innovations, and programs to grow jobs and support tourism.”<sup>19</sup>

Opponents of the project vehemently disagree with the sponsors’ claims. Environmental groups, including The Appalachian Mountain Club, Conservation Law Foundation, Society for the Protection of New Hampshire Forests, The Wilderness Society, Sierra Club, and others, all oppose the transmission line’s construction.<sup>20</sup> Although these environmental groups support renewable energy

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13. *Id.* at 41.

14. *Id.* §1.6, at 42.

15. *Energy and Natural Resources*, THE N. PASS, LLC, <http://www.northernpass.us/energy-and-natural-resources.htm> [https://perma.cc/7S5U-HT9T].

16. *Id.*

17. *Id.*

18. *Id.*

19. *Northern Pass Project Overview*, supra note 7.

20. See *Stopping Northern Pass*, CONSERVATION L. FOUND., <https://www.clf.org/making-an-impact/stopping-northern-pass/> [https://perma.cc/5SU9-NULZ]; see also *Northern Pass*, APPALACHIAN MOUNTAIN CLUB, <http://www.outdoors.org/consevation/hot-issues/northern-pass.cfm> [https://perma.cc/NMQ5-J6MF]; *Trees Not Towers Bury the Northern Pass!*, SOC’Y FOR THE PROT. OF N.H. FORESTS, <https://forestsociety.org/project/trees-not-towers-bury-northern-pass> [https://perma.cc/3DA A-SUHJ]; Catherine Corkery, *Northern Pass: A Burden Too Heavy for NH*, SIERRA CLUB N.H. CHAPTER (Nov. 13, 2015), <http://www.sierraclub.org/new-hampshire/northern-pass-editorial> [https://perma.cc/5LGU-UHAP].

efforts, they also acknowledge that such support includes “guiding projects to the right places and away from sensitive wildlands in the Northern Forest and elsewhere.”<sup>21</sup> Further, they argue that there is not clear evidence that this transmission line is ultimately the best solution for New England, claiming that “[t]he developers’ goal is to sell inexpensive Canadian hydropower to New England, but they haven’t proven that the project is needed to meet energy demands in the region.”<sup>22</sup> Additionally, some environmental groups maintain that “this type of large-scale hydropower [actually] adds to global warming and threatens northern species particularly vulnerable to climate warming.”<sup>23</sup> The Northern Pass sets out two competing versions of environmentalism—for project sponsors, the focus lies on the environmental benefits of reliable renewable energy, and for project opponents, the irreversible destruction of otherwise untouched lands. Additionally, the benefits of each environmental version fall to very different people. The transmission line’s construction would benefit the relatively wealthy residents of Southern New England, while harming the poorer residents of the North Country.

Because New Hampshire is viewed by its visitors as a peaceful escape from industrial city life, many residents fear that the destruction of the landscape will do irreparable harm. “The onerous aesthetic of wires crossing otherwise bucolic scenes of fall foliage and snow covered vistas will adversely harm [New Hampshire’s] tourism economy. Currently, the forests and farmland, the charming steeples, and flowing rivers and streams are unbridled by massive infrastructure; as such, they are treasured by all who come.”<sup>24</sup> This sentiment—that it is the magic of northern New Hampshire’s unadulterated land that drives tourism—is shared by all opposed to the project.

Additionally, there are other questions about the integrity of Hydro-Quebec’s operations, mainly, that it has decimated native Innu and Cree ancestral hunting grounds in its quest for “clean energy” and not compensated the native people for its use of their land.<sup>25</sup>

These competing arguments highlight the difficulties surrounding the environmental impacts of proposed projects between federal energy goals and local communities. Even actions marketed as “clean power initiatives” may not necessarily be good for the environment, or good for people living in the region, and the true environmental impact of the Northern Pass remains unclear. The first volume of the Northern Pass Transmission Line Project Environmental Impact Statement (“EIS”) chronicles the extensive harms the transmission line will have

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21. *Northern Pass Transmission*, THE WILDERNESS SOC’Y, <http://wilderness.org/article/northern-pass-transmission> [<https://perma.cc/2YQ3-QXMD>].

22. *Id.*

23. *Id.*

24. Corkery, *supra* note 20.

25. Sam Evans-Brown, *Indigenous Community Airs Long-Standing Grievances at Northern Pass Hearing*, N.H. PUB. RADIO (July 20, 2017), <http://nhpr.org/post/indigenous-community-air-long-standing-grievances-northern-pass-hearing#stream/0> [<https://perma.cc/2UFG-K7WD>].

on Northern New Hampshire, fondly referred to as the North Country.<sup>26</sup> These impacts include the negative impacts to visual resources, socioeconomic harms, as well as impacts related to health and safety, land use, air quality, wildlife, vegetation and geology.<sup>27</sup> Residents of the North Country do not want to see this line built, but if it is, they would like it to be buried, so as not to spoil the unparalleled beauty of their state.

When faced with such significant harms that impact the very essence of what gives New Hampshire its identity, it is unsurprising that the project is so passionately opposed. The question then becomes whether the localized harms experienced by Northern New Hampshire citizens, outweigh the opportunity to bring cleaner energy outside of the state. If not, would the construction of the Northern Pass then constitute something not only immoral, but illegal?

### Putting the Northern Pass in Context (2006 to Today)

After the Supreme Court's decision in *Kelo v. City of New London*<sup>28</sup> in 2005, New Hampshire enacted legislation to curb the use of eminent domain. In *Kelo*, the City of New London initiated condemnation proceedings on nine land owners in order to construct a waterfront hotel, restaurants, retail stores, and residences.<sup>29</sup> The Supreme Court held that the redevelopment plan served a "public purpose" and constituted a "public use" under the Takings Clause of the Fifth Amendment.<sup>30</sup> On June 23, 2006, New Hampshire's governor signed Senate Bill 287, which defined "public use" for eminent domain purposes as: "(1) general public or government entity possession, occupation, and enjoyment of real property; (2) public or private utility or common carrier use; (3) the removal of structures that are public nuisances . . . or (4) private use that occupies an incidental area within a public use."<sup>31</sup> Public use under the new law "*does not include taking property solely for facilitating incidental private use or for public benefit from private economic development, including increased tax revenue and employment opportunities.*"<sup>32</sup>

The Northern Pass was proposed in 2010 by Eversource Energy, a Massachusetts-based utility corporation and owner of Public Service Company of New Hampshire ("PSNH") as well as other electric utility companies in New England.<sup>33</sup> Due to the expensive electricity prices in New England, the Governors

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26. See generally N. PASS FEIS.

27. See generally *id.*, *Summary of Potential Impacts Associated with the Project*.

28. *Kelo v. City of New London*, 545 U.S. 469, 474 (2005).

29. *Id.*

30. *Id.* at 490.

31. 2A-7 Nichols on Eminent Domain Sec 7.10 (2017) S.B. 287, 159th Leg. (N.H. 2006).

32. 2A-7 Nichols on Eminent Domain Sec 7.10 (2017) (emphasis added).

33. Susan F. Tierney & Pavel G. Darling, *The Proposed Northern Pass Transmission Project: Assessing its impacts on New Hampshire*, ANALYSIS GRP., INC. 1 (Feb. 2017),

of the six New England states began to look for ways to reduce prices and lessen the regional grid's reliance on power plants that use natural gas.<sup>34</sup>

In 2012, New Hampshire passed HB 648 which prohibited public utilities from "petitioning for permission to take private land or property rights for construction or operation of an electric generating plant or an electric transmission project that is not eligible for regional cost allocation by ISO—New England or its successor regional system operator."<sup>35</sup> The bill also established "a commission to investigate procedures for obtaining a hearing for landowners whose property is being considered for eminent domain, develop a framework to provide use rights to transmission developers on state owned rights-of-way, develop policies to encourage burying such lines where practicable, and establish a structure for payment."<sup>36</sup> Although Northern Pass Transmission publicly stated that it would not exercise eminent domain, except as "a last resort,"<sup>37</sup> the 2012 legislation closed the option altogether.<sup>38</sup>

In 2014, New Hampshire published its State Energy Strategy, "which focused on modernizing the electric grid, increasing energy efficiency and fuel diversity, relying increasingly on in-state renewable and other energy resources and distributed energy resources."<sup>39</sup> The State was concerned that much of the money New Hampshire consumers spend on energy left the state to pay for imported fuels, instead of being circulated back into the State's economy.<sup>40</sup> However, the State also expressed its desire to be energy independent in order to produce local jobs and reduce dependence on imported sources of energy.<sup>41</sup>

In 2014 and 2015, "Connecticut and Rhode Island lawmakers signaled their support for entering into long-term contracts with Canadian suppliers of hydropower."<sup>42</sup> In August 2016, Massachusetts followed suit by passing H.4568, *An Act Relative to Energy Diversity*, also called the "Energy Diversity Act." The Massachusetts law requires the state's utilities to "solicit an amount of renewable energy generating resources equivalent to one-sixth of the state's total electricity requirements, and to enter into long-term contracts with those that are cost-effective."<sup>43</sup> The law "authorized the procurement of hydropower and require[d]

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available at [http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/pgs\\_final\\_northern\\_pass\\_report\\_2017-2-8.pdf](http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/pgs_final_northern_pass_report_2017-2-8.pdf) [https://perma.cc/8J7T-B9ES].

34. *Id.* at 3.

35. H.B. 648, 162nd Leg., Reg Sess. (N.H. 2012).

36. *Id.*

37. Ben Leubsdorf, *Northern Pass Debate Turns to the Pros*, CONCORD MONITOR (May 6, 2011), <http://www.concordmonitor.com/Archive/2011/05/999744497-999744497-1105-CM?page=0,1> [https://perma.cc/BQA5-Z62T].

38. *Why the Northern Pass Project Matters*, STATE IMPACT, <https://stateimpact.npr.org/new-hampshire/tag/northern-pass/> [https://perma.cc/TYW5-BGDR].

39. Tierney & Darling, *supra* note 33, at 2.

40. *Id.*

41. *Id.* at 3.

42. *Id.* at 3.

43. *Id.* at 4.



utilities to solicit and contract for 1,200 megawatts of clean energy generation.”<sup>44</sup> Massachusetts accounts for 45 percent of all electricity consumed in New England.<sup>45</sup> The bill passed nearly unanimously.<sup>46</sup> Following the passage of the bill, in April 2017, Eversource Energy, headquartered in Boston, Massachusetts and Hartford, Connecticut, “helped the Department of Energy Resources craft the Request for Proposals to meet the requirement, and included provisions that will likely encourage use of large scale hydropower.”<sup>47</sup> The bill “requires energy distribution companies to enter into long-term contracts of 1,600 megawatts of wind energy by 2027.”<sup>48</sup> The Northern Pass line would benefit the relatively wealthy inhabitants of Southern New England at the expense of the relatively poor inhabitants of the Great North Woods. Any environmental benefits should be weighed against this uncompensated and unprincipled redistribution of wealth.

Eversource’s “help” crafting the Request for Proposals set off an alarm among environmentalists, concerned about the lack of transparency surrounding the energy bids for Massachusetts’s long-term energy contract. Emily Norton, Massachusetts chapter director of the Sierra Club, found it uncomfortable “that Eversource and National Grid [another utility company] partnered with the Department of Energy Resources in drafting the request for proposals and awarding the contracts, while also standing to profit from it as bidders.”<sup>49</sup> While dozens of companies responded to the Massachusetts Department of Energy Resources request for proposals for the 1,200 megawatt energy bids, the competing companies were rightfully concerned that their competitors are “at the decision-making table.”<sup>50</sup> The criteria for how the projects are judged is not public, but are obviously known to Eversource Energy, which was a part of the drafting process.<sup>51</sup>

Massachusetts “must ensure our energy choices encourage growth in renewable generation and lead to real reductions in greenhouse gas emissions . . . Based on [Hydro-Quebec’s] annual reports and 10-year strategic plan, all of Hydro-Quebec’s current and future planned export capacity can be handled by current transmission lines. This means any new transmission lines to different markets, such as New England, would give the provincial utility the option to

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44. Jamie Garuti, *From Canada to the Commonwealth: Hydro-Quebec’s Controversial Northern Pass Project*, CLIMATE ACTION BUS. ASS’N, <https://cabaus.org/2017/07/20/hydro-quebec-the-northern-pass-project/> [<https://perma.cc/Q7LU-V4ME>].

45. Tierney & Darling, *supra* note 33, at 3.

46. Emily Norton, *Hydro-Quebec Power is Not What We Want: Emission Reductions, Tribal Claims, Money Outflow all Concerns*, COMMONWEALTH MAG., Dec. 17, 2017.

47. Garuti, *supra* note 44.

48. Elise Harmon, *In 2016, Massachusetts Passed a Landmark Renewable Energy Bill- Here’s What You Need to Know*, NEW ENGLAND CLIMATE CHANGE REV. (Dec. 19, 2016), <https://www.northeastern.edu/climateview/?p=294> [<https://perma.cc/P9XM-MQNM>].

49. Norton, *supra* note 46.

50. *Id.*

51. *Id.*

schedule their exports of hydropower where and when prices are highest . . . leaving everyone paying more, and leaving capacity gaps to be filled with existing dirty fuels such as methane gas.”<sup>52</sup> If there is no true reduction in GHG emissions released, then the purpose of the bill is defeated.<sup>53</sup>

While it is of course commendable that Massachusetts, and other New England states are taking steps to reduce reliance on fossil fuels, Massachusetts’s decision to pass H.4568 essentially created a market for Northern Pass.

Simply put, “if there is no artificially created and subsidized market for Canadian hydropower, there will be no transmission lines acting as extension cords. But the converse is also true. If Massachusetts, with its deep pockets and enormous energy appetite, does approve legislation paying wildly above-market prices for power supply from Canada, it will be much more difficult to indefinitely fight off the relentless push by Hydro-Quebec and Eversource to build more transmission lines and sell the power to consumers in Massachusetts and other southern New England states.”<sup>54</sup>

Massachusetts pays one of the highest prices for electricity in the continental United States, paying less than only Rhode Island and Connecticut, both of which will benefit from the Northern Pass’s construction and have similarly enacted laws that encourage proposals to supply hydroelectric supply from Canada.<sup>55</sup>

New Hampshire residents hoped to change the minds of Massachusetts lawmakers by appealing to their sensibilities before the vote to no avail, pleading that “*one state’s environmental solutions may be another state’s environmental nightmare, and we should all care about the whole picture—not just our own small piece—to achieve the greatest long-term impact.*”<sup>56</sup> New Hampshire’s White Mountains and Great North Woods offers “long pristine stretches of woods and mountains that run virtually unspoiled from the middle of the Granite State to Canada.”<sup>57</sup> The unadulterated beauty of the State would be forever scarred by the project.

On November 16, 2017, The U.S. Department of Energy issued a Record of Decision and approved the Presidential Permit for the Northern Pass hydroelectric transmission project. The Permit approved the project to include 132 miles of overhead lines, 60 miles of underground lines (beneath the White Mountain National Forest, after public outcry), six aboveground transition stations, one new

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52. *Id.*

53. *Id.*

54. Alan Robert Baker, *Northern Pass is not a Green Answer*, COMMONWEALTH MAG. (June 17, 2016), <https://commonwealthmagazine.org/environment/northern-pass-is-not-a-green-answer/> [<https://perma.cc/SZ2Q-DJC6>].

55. U.S. ENERGY INFO. ADMIN., INDEPENDENT STATISTICS & ANALYSIS, STATE ELECTRICITY PROFILES, DATA FOR 2015 (Jan. 17, 2017), <https://www.eia.gov/electricity/state/> [<https://perma.cc/GGG7-33RJ>].

56. Baker, *supra* note 54 (emphasis added).

57. Baker, *supra* note 54.

converter station, and substation upgrades.<sup>58</sup> The DOE “received seven comment documents on the final EIS—from the Appalachian Mountain Club, the EPA, Pessamit Innu First Nation, Hydro-Quebec, New Hampshire Department of Environmental Services, the Conservation Law Foundation, and one individual.”<sup>59</sup>

Over the last several years, even as average natural gas prices and electricity costs have dropped in New England, several new high-voltage transmission projects (in addition to the Northern Pass) have been proposed to link Canadian utility systems with markets in New England and New York.<sup>60</sup> Because of this, the New Hampshire Site Evaluation Committee (SEC) had to consider whether the Northern Pass is in the public interest.<sup>61</sup>

On December 21, 2017, the last of seventy adjudicative hearings on the Northern Pass project concluded in Concord, New Hampshire. On January 25, Massachusetts chose Northern Pass for its long-term energy contract.<sup>62</sup> Northern Pass beat out several other bids, including the New England Clean Power Link, which “proposed delivering hydropower from Quebec through transmission lines that would be buried under Lake Champlain in Vermont, and a proposal by Central Maine Power Company to bring in hydropower through existing transmission corridors and newly purchased rights of way in western Maine.”<sup>63</sup>

Bill Quinlin, Eversource New Hampshire president, expressed his confidence the project would receive a permit from the NH Site Evaluation Committee, with the caveat that, if not, they would seek rehearing or a court appeal.<sup>64</sup> However, opponents of the project expressed their disappointment in Massachusetts’ decision.<sup>65</sup> “New Hampshire’s being asked to carry too much of a burden with little or no benefit, and that’s the disappointing thing from the standpoint of what Massachusetts has done,” says spokesman Jack Savage. “They’ve ignored the adverse impacts New Hampshire would have to bear for what they see as benefits to them.”<sup>66</sup> Independent power generators and analysts are also critical of the project, claiming that the long-term contract with such a large energy source will detract from diversity on the New England grid.<sup>67</sup> Eric Wilkinson, director of energy policy with the Environmental League of

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58. Dept. of Energy Record of Decision for Issuing Permit to Northern Pass Transmission Line Project, 82 Fed. Reg. 55, 595 (Nov. 22, 2017).

59. *Id.*

60. Tierney & Darling, *supra* note 33, at ES-1.

61. *Id.*

62. Annie Ropiek, *Massachusetts Picks Northern Pass for Major Energy Contract*, N.H. PUB. RADIO (Jan. 25, 2018), <http://nhpr.org/post/massachusetts-picks-northern-pass-major-energy-contact#stream/0> [<https://perma.cc/ST9C-Y697>].

63. Bob Salsberg, *Massachusetts Taps Northern Pass for Hydropower Project*, ASSOCIATED PRESS (Jan. 25, 2018), <https://www.apnews.com/9aefcaab5f78424fb53fd4fa844a6017> [<https://perma.cc/8HCQ-Q9TN>].

64. Ropiek, *Massachusetts Taps Northern Pass*, *supra* note 62.

65. *Id.*

66. *Id.*

67. *Id.*

Massachusetts, said “this project is going to go through virgin forest, a major disruption to habitat, and it is probably the most environmental intrusive project out there.”<sup>68</sup>

On February 1, 2018, one week after Massachusetts picked the \$1.6 billion project as the winning proposal for the twenty-year energy supply, the New Hampshire SEC unanimously voted to deny the permit to Eversource for the Northern Pass Project—a huge blow to project proponents.<sup>69</sup> The SEC panel concluded that Eversource had not met its burden in showing Northern Pass would not “unduly interfere with the orderly development of the region.”<sup>70</sup> Eversource expressed public “shock and outrage” at the SEC’s decision, stating that “the process failed to comply with New Hampshire law and did not reflect the substantial evidence on the record . . . Clearly, the SEC process is broken. . . .”<sup>71</sup>

On February 17, 2018, Massachusetts electric utilities and the Massachusetts Department of Energy Resources selected the New England Clean Energy Connect (NECEC) transmission project to move forward as the alternative if the Northern Pass Transmission project fails to win approval from the New Hampshire SEC by March 27, 2018.<sup>72</sup> The NECEC project also utilizes hydropower from Hydro-Quebec, and would require a new transmission line to be built on some of the line through Western Maine.<sup>73</sup>

On March 28, 2018, Massachusetts regulators announced they were dropping plans for the Northern Pass to supply clean energy, and instead going with a rival Maine project.<sup>74</sup> Jack Savage, of the Society for the Protection of New Hampshire Forests, declared, “the extension cord is now unplugged.”<sup>75</sup>

Two days later, on March 30, the New Hampshire SEC released a 287-page written decision summarizing the evidence and explaining its reasoning, after seventy days of hearings, 2,176 exhibits, and testimony by 154 witnesses, for rejecting the proposal.<sup>76</sup> Northern Pass project officials claimed that the project

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68. Salsberg, *supra* note 63.

69. Annie Ropeik, *Site Evaluation Committee Casts Unanimous Vote Against Northern Pass Project*, N.H. PUB. RADIO (Feb. 1, 2018), <http://nhpr.org/post/site-evaluation-committee-casts-unanimous-vote-against-northern-pass-project#stream/0> [<https://perma.cc/QUU5-SD52>].

70. *Id.*

71. *Id.*

72. Rebecca Ruttenberg, *Central Maine Power Transmission Proposal Selected as Solution for Massachusetts Clean Energy Initiative*, NEW ENGLAND CLEAN ENERGY CONNECT (Feb. 17, 2018), <https://www.necleanenergyconnect.org/necec-milestones/2018/2/17/central-maine-power-transmission-proposal-selected-as-solution-for-massachusetts-clean-energy-initiative> [<https://perma.cc/S7TE-DGCW>].

73. *Id.*

74. Michael Cousineau, *Mass. Drops Northern Pass bid in favor of rival project*, N.H. UNION LEADER (Mar. 28, 2018), <http://www.unionleader.com/business/massachusetts-drops-northern-pass-bid-in-favor-of-rival-project—20180328>.

75. *Id.*

76. Michael Cousineau, *SEC: Northern Pass Would Create ‘Negative Impact’ on Nearby Land Use*, N.H. UNION LEADER (Mar. 30, 2018), <http://www.unionleader.com>

would deliver tens of millions of dollars in yearly property taxes, as well as more than \$60 million a year in energy savings for New Hampshire, but the SEC found, that “while benefits to the economy and employment would be positive, we cannot find they would be as large as the applicant predicts.”<sup>77</sup> The committee said thirty of the thirty-two municipalities along the route stated the project would interfere with the region’s orderly development and that the towers would have a substantially different effect on smaller rural neighborhoods than the existing transmission facilities.<sup>78</sup> The SEC’s attorney said that the committee would not reconsider its denial of the project until May 2018.<sup>79</sup>

Northern Pass spokesman Martin Murray stated that Northern Pass expects to soon file a motion for rehearing, stating that “the SEC’s decision-making process failed to comply with New Hampshire law and did not reflect the substantial evidence on the record.”<sup>80</sup> Despite the setbacks, Eversource maintains that, “the Northern Pass is the best project for the region and New Hampshire, and we intend to pursue all options for making it a reality.”<sup>81</sup> New Hampshire nonprofit groups hope that, “[a]fter eight years, enough is enough. It is long past time for New Hampshire to move on from the Northern Pass.”<sup>82</sup> Although opponents are hopeful that this is the end, the fight against the Northern Pass is not yet over.

### Is Quebec “Clean” Really “Green”?

Hydropower is marketed as “clean and renewable,” and as “the ideal means of meeting major challenges facing North America in terms of reducing greenhouse gas emissions and ensuring a secure electricity supply.”<sup>83</sup> Hydro-Quebec claims that their electric hydropower produces no toxic waste and that methane emissions are “not an issue in Quebec” due to the cold temperatures of the water.<sup>84</sup> However, in 2012, several teams of scientists analyzed data collected at Hydro-Quebec’s Eastmain 1 reservoir in northern Quebec and determined that “[i]n the first several years after a reservoir is dammed, large amounts of newly inundated organic material decompose, emitting carbon dioxide that diffuses through the water into the atmosphere. As a result, a reservoir’s net emissions in its early years are very high—starting out even higher than emissions from a

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/apps/pbcs.dll/article?avis=UL&date=20180330&category=NEWS05&lopenr=180339913&Ref=AR&template=printart.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Michael Cousineau, *Mass. Drops Northern Pass Bid in Favor of Rival Project*, N.H. UNION LEADER (Mar. 28, 2018), <http://www.unionleader.com/business/massachusetts-drops-northern-pass-bid-in-favor-of-rival-project—20180328>.

82. *Id.*

83. *Our Energy is Clean and Renewable*, HYDRO-QUEBEC, <http://www.hydroquebec.com/about/our-energy.html> [<https://perma.cc/5LBH-Q9RM>].

84. *Id.*

natural gas power plant per unit of power generated.”<sup>85</sup> This Eastmain 1 reservoir is the “same project that Northeast Utilities’ CFO testified under oath [in 2011] would be the primary, if not exclusive, source of Northern Pass’s power.”<sup>86</sup> The Conservation Law Foundation noted that, “[e]ven when their emissions are projected over their lifetimes, newly flooded Canadian reservoirs may emit nearly two-thirds of the greenhouse gases emitted by natural gas power plants.”<sup>87</sup> Although Northern Pass Transmission claimed that the current [as of 2012] Northern Pass proposal would reduce GHG emissions by up to 5 million tons, the Conservation Law Foundation found that number was based on the erroneous assumption that hydropower has no greenhouse gas emissions.<sup>88</sup> In 2012, Synapse Energy Economics released a technical report, “Hydropower Greenhouse Gas Emissions: State of the Research” which independently surveyed the recent science regarding GHG emissions of hydropower. The report noted that, “[h]ydroelectric generation of electricity . . . is commonly thought of as renewable, sustainable, and lacking in emission of atmospheric pollutants; however, these assumed benefits are rarely evaluated critically . . . .”<sup>89</sup> “Research done at Hydro-Quebec’s Eastmain 1 reservoir showed that net GHG emission rates within one year of reservoir creation increased from 3,200 to 500,000 tonnes of carbon, a 156-fold increase . . . suggest[ing] that hydropower from the reservoir produced more GHG emissions than a natural gas combined-cycle facility each year for three years after impoundment.”<sup>90</sup>

Sierra Club director of New Hampshire, Catherine Corkery maintains, “[t]here is nothing “green” about hydropower emanating from Quebec. Massive hydroelectric dam and reservoir building in Quebec has caused the inundation of millions of acres of boreal forest, destruction of entire river ecosystems, and release of mercury poison into the food chain.”<sup>91</sup> Unlike the claims made by Hydro-Quebec and Eversource, Corkery argues, “Hydro Quebec is not pollution-free power” echoing concerns about the flooding of the reservoirs producing CO<sub>2</sub> and methane.<sup>92</sup> “According to Hydro Quebec’s own studies, the CO<sub>2</sub> emissions are as high as 70% of a natural gas power plant.”<sup>93</sup> The Environmental Protection Agency has classified methane as being twenty-five times worse than carbon

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85. Christophe Courchesne, *Latest Research: Northern Pass Worse for Climate than Advertised*, CONSERVATION L. FOUND. (Feb. 14, 2012), <https://www.clf.org/blog/latest-research-northern-pass-worse-for-the-climate-than-advertised/> [https://perma.cc/59PR-A3Q2].

86. *Id.*

87. *Id.*

88. *Id.*

89. William Steinhurst, Patrick Knight, & Melissa Schultz, *Hydropower Greenhouse Emissions: State of the Research*, SYNAPSE ENERGY ECONS., INC. 1 (Feb. 14, 2012).

90. *Id.* at 14.

91. Baker, *supra* note 54.

92. Corkery, *supra* note 20.

93. *Id.*

dioxide.<sup>94</sup> “The flooded reservoirs also accelerate mercury releases rendering the fish too poisonous for consumption.”<sup>95</sup>

Because of this, some have called the Northern Pass a “destructive, imposter project that camouflages behind the namesakes of “clean” and “renewable” energy.”<sup>96</sup> Even if Canadian hydropower yielded the environmental benefits Hydro-Quebec claimed, that energy does not come without a price. The Pessamit Innu First Nation has paid the price of Hydro-Quebec’s hydropower, and knows of the destruction all too well.

As it stands, depending on how many of the five available turbines are running to meet demand, the existing Betsiamites dam causes rapid water level fluctuations in the river. This has submerged the vital natural ecosystem that exists between the tributary and the forest, forcibly displacing the Pessamit people from their land and killing off many bankside species. The Pessamit liken these rivers to their travel routes or “highways”—they are now unsafe to travel due to debris and strong currents. The Betsiamites salmon are also at serious risk of complete extinction as a result of Hydro-Quebec’s heinous and imprudently implemented infrastructure that suffocates spawning grounds and prevents migration.<sup>97</sup>

On July 19, 2017, officials opened the floor at a Concord, New Hampshire hearing to receive public feedback on the Northern Pass Project. The Pessamit Innu attended the hearing, as “[n]early one third of the dams that power Quebec’s electric grid were built on the ancestral territory of the Pessamit Innu, a Canadian First Nation on the North Shore of the Saint Lawrence River.”<sup>98</sup> The Pessamit filed to intervene in the Northern Pass in November of 2016, but their request was denied.<sup>99</sup> During the hearing, Pessamit elders spoke in front of the New Hampshire Evaluation Committee, saying the goal of their trip was “to make New England aware that 29 percent of the electricity Hydro Quebec intends to sell was acquired in an immoral and illegal manner to the detriment of the Pessamit.”<sup>100</sup> Hydro-Quebec denied these allegations, saying they have been collaborating with the Pessamit and have signed multiple agreements to pay out the community.<sup>101</sup> The Pessamit and Hydro-Quebec signed an agreement in 1973 which offered the community “\$150,000 for “all damages, past, present, and future” caused by hydroelectric development on their territory.”<sup>102</sup> In 1998, the Pessamit band council filed suit, claiming this agreement was abusive and the federal government

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94. *Id.*

95. *Id.*

96. Chloe Grant, *Is Hydro Quebec a Criminal Organization? The Pessamit Problem*, THE MCGILL TRIBUNE (Sept. 12, 2017), <http://www.mcgilltribune.com/opinion/is-hydro-quebec-a-criminal-organization-the-pessamit-problem-091217> [<https://perma.cc/R5SR-J6NQ>].

97. *Id.*

98. Evans-Brown, *supra* note 25.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

had failed in its fiduciary duty to protect them; however, the suit remains unresolved.<sup>103</sup>

The tribe testified that the salmon was on the verge of extinction. “The tribe contends the annual salmon catch has fallen from more than 1,100 in 1948 to less than 100 last year.”<sup>104</sup> As a result of Hydro-Quebec’s actions, “hunting grounds were flooded and conditions of the Betsiamites River, where the tribe members fish for salmon, have worsened . . . The waters have become more turbid, and the tribe blames the two power stations for fluctuating flow rates that sweep away young salmon to their death and destroy their eggs.”<sup>105</sup> Hydro-Quebec maintains the salmon population has declined due to climate change, and not their actions.

In an August 30, 2017, letter to the U.S. DOE, the Pessamit Innu “provided information about its past experiences with Hydro-Quebec and ongoing concerns related to Hydro-Quebec’s operations including planned modifications, operational changes, Canadian environmental review and potential effects to the Pessamit Innu First Nation and its territory.”<sup>106</sup> Hydro-Quebec responded on October 11, 2017, by submitting their own letter to the DOE addressing the Pessamit’s concerns.<sup>107</sup> The DOE, however, said that because the issues raised related to processes in Canada, the potential impacts in Canada were beyond the scope of the National Environmental Policy Act (“NEPA”) analysis, and “NEPA does not require an analysis of potential environmental impacts that occur within another sovereign nation that result from actions approved by that sovereign nation.”<sup>108</sup> As the final EIS noted, DOE does not analyze the impacts in Canada of Hydro-Quebec power generation and transmission line projects because these impacts are analyzed in accordance with the sovereign laws of Canada and because DOE (nor any other U.S. federal agency) has no authority over development of the Hydro-Quebec system.”<sup>109</sup>

The Pessamit and environmentalists worry that “if the Northern Pass proposal succeeds, all five turbines in the Betsiamites dam will likely need to run constantly, 24 hours a day, 365 days a year. The surviving salmon populations will become completely extinct, the Betsiamites ancestral homeland and Rivershore ecotone entirely devastated, the people wholly displaced, and thousands of years of harmonious living and natural beauty eradicated.”<sup>110</sup> Emily Norton, Massachusetts Sierra Club director, shares these concerns. “A five-turbine dam can cause a six-foot fluctuation in water levels multiple times per day. Downriver from Quebec’s projects, salmon as well as many bankside animal and plant species,

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103. *Id.*

104. *First Nation Opposed Proposed Powerline Project in New Hampshire*, ASSOCIATED PRESS (July 20, 2017), <https://www.ctvnews.ca/business/first-nation-opposes-proposed-powerline-project-in-new-hampshire-1.3512757> [<https://perma.cc/7D4T-7X3U>].

105. *Id.*

106. Dep’t of Energy Notice of Decision, *supra* note 58.

107. *Id.*

108. *Id.*

109. *Id.*

110. Grant, *supra* note 96.



including the otter, mink and beaver populations, have been decimated. Surging waters erode the banks, pulling trees and debris into the river and suffocating salmon egg spawning grounds with layers of thick silt.”<sup>111</sup>

Decomposing vegetation in these reservoirs and other factors produce about the same amount of greenhouse gas emissions as a gas-fired electricity plant (the type of generation Northern Pass would likely replace) at least in the early years after flooding, and the carbon-capturing trees are gone forever. If the people of Quebec, through their Crown Corporation, Hydro-Quebec, decide to destroy their land, we can’t really do anything about that. But we object to Northern Pass using “green energy” as its main argument when it is very much open to question.<sup>112</sup>

### Socioeconomic Impacts of the Northern Pass

The massive hydropower line, will run from the Canadian border, through five New Hampshire counties, thirty communities, and through the White Mountain National Forest.<sup>113</sup> The population statistics for potentially affected counties and other regions is approximately 627,878 people, or, approximately half of the entire population of New Hampshire.<sup>114</sup> Similarly, the five affected counties account for approximately half of the employed persons in New Hampshire.<sup>115</sup>

As the Environmental Impact Statement (“EIS”) correctly notes, “[e]mployment in New Hampshire fluctuates seasonally, peaking in the summer months with the increase in tourism and employment of students.”<sup>116</sup> Because tourism is estimated to be the second largest industry in New Hampshire, citizens living and working near the affected area are gravely concerned about the project’s impact on tourism.<sup>117</sup>

As the EIS notes, “[s]ome of the key aspects of tourism in New Hampshire are the natural environment, scenery, and outdoor recreation”<sup>118</sup> and “approximately 68,000 New Hampshire residents are employed in tourism-related industries.”<sup>119</sup> The ‘Arts, Entertainment, Recreation, Accommodation and Food Services’ sector provides between 8 percent to 14 percent of the potentially affected counties, 14 percent in Coös County, the northern-most county in New Hampshire, which will bear the brunt of the Northern Pass’s burden.<sup>120</sup> Coös

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111. Norton, *supra* note 46.

112. Nancy Martland, *Unneeded Power Line Would Scar New Hampshire*, HARTFORD COURANT (July 26, 2013), <http://www.courant.com/opinion/hc-op-martland-northern-pass-transmission-line-rui-20130726-story.html>.

113. N. PASS FEIS, *Employment*, § 3.1.2.2, at 40.

114. *Id.* Table 3-2: Population Statistics for Potentially Affected Counties and Other Regions (U.S. Dep’t of Energy).

115. *Id.* *Employment*, § 3.1.2.2, at 40.

116. *Id.*

117. *Id.* *Employment*, § 3.1.2.4, at 40.

118. N. PASS FEIS, Chart 3-3, *Primary Purpose of Trip to New Hampshire*, at 3–9.

119. *Id.* § 3.5.

120. *Id.* *Socioeconomic Impact*, § 3.1.2.2.

County will be the most changed by the Northern Pass, “as the first forty miles of the proposed electricity line will be built in a newly, yet to be acquired right of way through the county.”<sup>121</sup>

Further, although New Hampshire’s unemployment rates were lower than the national average in 2015, Coös County’s unemployment is over a full percent higher than the rest of the state of NH and the other affected communities.<sup>122</sup> More significantly, Coös County has the highest poverty rate in the state, at 9.9 percent in 2015, over 4 percent higher than the state’s average.<sup>123</sup>

In 2015, New Hampshire ranked as the “seventh-lowest state in terms of electricity consumption per capita;” however, the average retail price for electricity paid by consumers in the New England region was 16.5 cents/kWh, compared to 10.4 cents/kWh across the United States as a whole. “Prices in New England were the highest of any region in the contiguous U.S. Average prices in New Hampshire were 16.0 cents/kWh ranking fourth-highest across the contiguous states, lower only than prices in Connecticut, Rhode Island, and Massachusetts.”<sup>124</sup>

“Portions of the potential adverse impacts of the Project, such as possible adverse impacts on property values, would be borne primarily by persons residing near the proposed routes.”<sup>125</sup> The EIS also notes that “[u]nder certain conditions, high-voltage transmission lines may have adverse impacts on the value of nearby properties, primarily due to the visual impact of the lines and towers.”<sup>126</sup> Using an evaluation based on the findings of “prior research regarding impacts of high-voltage transmission lines in other locations, combined with estimates of the value of the residential property adjacent to or nearby the above-ground segments of the Proposed Action and the action alternatives.”<sup>127</sup>

Under certain circumstances, HVDC transmission lines constructed above ground may have an adverse impact on the value of adjacent and nearby properties. The underlying reasons for such impacts include the potential for a perception of health hazards resulting from proximity to HVDC lines and potential for adverse aesthetic impact due to the visibility of the transmission lines and support structures.<sup>128</sup>

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121. Jerry Monkman, *The View is Worth It—Coös County, NH and the Northern Pass*, ECOGRAPHY (Apr. 26, 2013), <http://ecophotography.com/the-view-is-worth-it-Coös-county-nh-and-northern-pass/> [<https://perma.cc/RJX6-APBR>].

122. N. PASS FEIS, *Socioeconomic Impact Statement*, Table 4: Unemployment Rates in the Potentially Affected Counties and Comparator Regions, 2005-2015, § 3.1.2.2, at 10.

123. *Id.* Table 5: Demographic Characteristics of the Potentially Affected Counties and Comparator Regions, 2015, § 3.1.2.2, at 10.

124. *Id.* Socioeconomics Technical Report, Electricity System, § 2.5, at 12.

125. *Id.* § 2.5, at 14.

126. *Id.*

127. *Id.*

128. *Id.* § 3.4, at 24.

The Northern Pass EIS analyzed several studies to provide estimates of the impact of above ground HVAC lines on property values and found that overhead transmission lines may reduce the value of nearby properties by up to approximately fifteen percent for properties in the range of 100 feet from a transmission line, but said that such values decline with distance, “nearing zero approximately 500 feet from the transmission line.”<sup>129</sup> The edge of the right of way is approximately 100 feet.<sup>130</sup>

These findings contradict the testimony of New Hampshire resident, Jim Dannis, who owns property upon which PSNH already has a right of way.<sup>131</sup> At a July 2011 Site Evaluation hearing, Dannis held up a copy of a recent appraisal for which he’d contracted, showing that on one twelve-acre building lot, the appraiser estimated a ninety-two percent reduction in value if the transmission lines were installed.<sup>132</sup>

“The EPA defines “environmental justice” as “the fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” An analysis of environmental justice therefore requires an assessment of the demographics of the potentially affected populations to determine if the potential impacts could “disproportionately” affect minority or low-income residents.”<sup>133</sup>

The EIS determined that the data collected for its environmental justice consideration did not appear to indicate the potential for any “disproportionate” impact.<sup>134</sup> It noted that “the two groups of residents [those located on and off the proposed route] have similar poverty rates, each with six-percent of families living below the poverty level. New Hampshire residents in the potentially affected group for the Proposed Action have a median household income of \$50,000 to \$59,999, only one tier below the range of \$60,000 to \$74,999 for other New Hampshire residents.”<sup>135</sup>

However, because the EIS pools together all affected groups and uses an average, the impact appears less severe than it is in reality. In Coös County, the median household income is \$42,312, more than \$20,000 less than the State’s average.<sup>136</sup> By including Rockingham County (the southern-most county in the

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129. *Id.* § 3.4, at 25.

130. *Id.*

131. Hydro-Quebec and PSNH have a 20-year contract pending, in Northern Pass is approved.

132. Ben Hewitt, *Battle Lines: The Northern Pass Energy Project*, YANKEE MAG. (Oct. 12, 2011), <https://newengland.com/yankee-magazine/living/new-england-environment/northern-pass-battle/> [<https://perma.cc/XXZ3-LBV7>].

133. N. PASS FEIS, *Socioeconomic Impact Statement*, Socioeconomics Technical Report, § 2.5, at 7.

134. *Id.* at 30.

135. *Id.*

136. N. PASS FEIS, *Socioeconomic Impact Statement*, Table 2.3: Demographic Characteristics of the Potentially Affected Counties and Comparator Regions, at 11.

potentially affected county pool, which averages over \$80,000 in median household income) the environmental justice analysis is grossly skewed.<sup>137</sup>

The EIS states that the project “would generate increased economic activity within New Hampshire, including employment and output (the amount of goods and services produced in the economy), during the construction and operation phases.”<sup>138</sup> Such increases include spending by out-of-state contractors temporarily residing in New Hampshire, purchases of materials and services within New Hampshire and in-state spending by Northern Pass employees.<sup>139</sup> However, the potential for temporary economic growth during construction falls short as a sale’s pitch. Opponents of the line argue that “the projected \$1.1 billion cost of the venture could be better spent on domestic energy ventures or on conservation efforts that would reduce demand as much or more than the Northern Pass would generate.”<sup>140</sup> Especially when one considers that the Northern Pass is a private, for-profit entity that stands to generate more than \$50 billion in revenue for Hydro-Quebec, these economic assurances are unconvincing.

### The Fight for New Hampshire

To people in the North Country, the land they own is more than just a piece of property. It holds their dreams, their memories, and it is often all they have.<sup>141</sup> It is no secret that the residents of Northern New Hampshire are struggling. Northern Pass Transmission certainly knows it. Eversource, the Massachusetts-based partner corporation of Hydro-Quebec, offered the owners of the Balsams<sup>142</sup> two million dollars in Eversource shareholder funds and “dangl[ed] promises of as much as \$100 million from the so-called *Forward NH Fund* if Northern Pass were ever permitted.”<sup>143</sup> This is a shocking and coercive promise. Essentially, Eversource is now “making direct payments to elicit support” for the project.”<sup>144</sup> “[I]n attempting to link success at the Balsams to success with an overhead Northern Pass line, Eversource and Mr. Otten [the owner of the Balsams] are taking

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137. *Id.*

138. *Id.*

139. *Id.* at 16–17.

140. Hewitt, *supra* note 132.

141. See Howard Mansfield, *The Northern Pass Project: ‘My Roots Are Deeper than Your Pockets’*, YANKEE MAG. (Feb. 20, 2013), <https://newengland.com/yankee-magazine/living/new-england-environment/northern-pass-land-owners/> [https://perma.cc/LU62-4K K4].

142. The Balsams is a resort which is undergoing redevelopment, located in Coös County, the poorest county in the state.

143. Jane A. Difley & William Webb, *Northern Pass behaving badly*, N.H. BUS. REV. (Apr. 29, 2016), <http://www.nhbr.com/April-29-2016/Northern-Pass-behaving-badly/> [https://perma.cc/AH68-DV7H].

144. *Id.*

things a step further by twisting arms to change input submitted to the Site Evaluation Committee.”<sup>145</sup>

According to local reports, “Les Otten and his partners have subsequently sought to rub out local opposition to Northern Pass as proposed with a simple threat: The Balsams redevelopment won’t go forward without big money from Northern Pass, and that money only comes if Northern Pass is permitted.”<sup>146</sup>

This is not an isolated incident, Northern Pass offered half a million dollars to Landon Placey for his 114 acres of land in Stewartstown. Further, “[t]he contract he’d signed required him to secretly offer [his aunt] Lynne the same opportunity.”<sup>147</sup> Lynne Placey is a sixty-six-year-old widow, living off Social Security, but said she would not be selling.<sup>148</sup> Shortly after her nephew’s proposal, Lynne wrote a letter to local newspapers describing the event.<sup>149</sup> In it, she wrote:

Can you imagine what half a million dollars would do for me? I won’t tell you I didn’t give some thought to all that money. The gold-plated carrot was dangled in my face. Would I bite? . . . On principle, the idea of a foreign corporation coming in to our pristine North Country to ruin it for their personal gain went against everything I believe in . . . [M]y conscience, my ethics, my devotion to New Hampshire’s beauty, the memory of my husband, the love for my children and grandchildren, my concern for the health of those living near the towers, and more. . . . Don’t believe them when they tell you Northern Pass is a done deal, that your land will be worthless if you don’t sell. Don’t let them isolate you; don’t let them scare you. Don’t sell out your neighbors. I know in my heart I am doing what is best for my beloved North Country.

Yours truly, a devoted native.<sup>150</sup>

It is a devotion to New Hampshire and to its sacred beauty that pushes residents to fight this project. “The thing is: You know material things are going to eventually rust out, break . . . [t]hey’re going to end up in the garbage or in the dump . . . I think it’s more important to leave my children and my grandchildren the inheritance of land. Because land is something that you can pass from one generation to the other. And they can enjoy working on the land just the same as we have, and Donald’s family before him.”<sup>151</sup> Lynne agreed to sell a conservation

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145. *Id.*

146. *Id.*

147. Mansfield, *supra* note 141.

148. *Id.*

149. *Id.*

150. *Id.* (emphasis added).

151. *Id.*

easement to the Society for the Protection of New Hampshire Forests in order to stop the Northern Pass's route.<sup>152</sup>

To those in the North Country, "land is allegiance."<sup>153</sup> The sentiment that "[t]his place is who I am" so "how can we sell it?" echoes across the North.<sup>154</sup>

Just like Lynne, Rod McAllaster could have sold his dairy farm for four million dollars, but he refused.<sup>155</sup> He loves his land. "When a real-estate agent showed up unannounced at his farm, Rod told him, 'I'm not interested at all. I don't even have to think about it.' There was no amount of money the man could offer. 'My roots are deeper than your pockets.'"<sup>156</sup>

John Harrigan, who has been called "the voice of the North Country" has a similar experience.<sup>157</sup> "There are very few places left like this . . . [w]ild country that you could travel as far as the eye could see and maybe not see anybody. A landscape that's largely untouched by any great scars."<sup>158</sup> John describes his tie to the land "like a religion. Really, you have a hard time beginning to describe to somebody why you have a religion. It's just there."<sup>159</sup>

In one of John's first columns about Northern Pass, in December 2010, he wrote: "We here in the North Country are at rope's end. Having lost about all of our industry and not having [help from the state], *we have only the landscape left, which is our definition, our heritage, our livelihood, and our meager future.*"<sup>160</sup> John Harrigan exemplifies this intangible deeper-than-deep tie to the land. This kind of deep respect of the North Country is such that those who have never felt it cannot possibly understand. "I've got some meat in my refrigerator that came from a deer that a guy shot up on my first meadow, my first hayfield. I've watched that deer grow up. My mother's and father's ashes are in that hayfield . . . [a]s are my younger brother's. I'm eating ashes and microbes that grew into grass that the deer ate. It's just the way it is. *I'm from the land, I'm on the land, I love the land, and eventually I'll go back to the land.*"<sup>161</sup>

This is the poetry of the Great North Woods. The land is religion. It is connection. It lives inside the people of New Hampshire as much as those people live on it. So how can we, as a society, define the kind of harm that ensues when you take away something of this magnitude? Especially when the land is all that they have. This kind of language is reminiscent of the native people of northeastern Quebec, the Innu, who "have been protesting Hydro-Quebec's installation of

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152. Other families have similarly offered conservation easements to deny the Northern Pass.

153. Mansfield, *supra* note 141.

154. *Id.*

155. *Id.*

156. *Id.* (emphasis added).

157. Mansfield, *supra* note 141.

158. *Id.*

159. *Id.*

160. *Id.* (emphasis added).

161. *Id.* (emphasis added).

power lines through their ancestral lands without their permission . . . Our land is the last thing we have left,” one person observed. “It’s our identity.”<sup>162</sup>

In 1989, Hydro-Quebec proposed the “Great Whale” project, which entailed “the flooding of an area the size of New Hampshire [on Cree native land], severely threatening not only the Cree, but flora and fauna as well.”<sup>163</sup> Before this proposal, Hydro-Quebec had already flooded approximately one thousand acres in the Cree area for hydropower.<sup>164</sup> “The Cree have seen thousands of square miles of old hunting grounds, sacred burial grounds, and villages drowned; rivers dammed; forests clear-cut and sliced through with roads. They have negotiated long, complex agreements with Quebec. It has won them some compensation: jobs, investment, autonomy in local governments and schools. And it has lost them much of their old way of life and brought high mercury levels in fish and in people, alcoholism, drugs, and suicide. It’s a complicated ledger sheet of loss and gain. They have bravely attempted to meet modern times on their own terms.”<sup>165</sup>

“It’s always the case that we are asked to give up a way of life,” Grand Chief Matthew Coon Come said later. “We are asked to compromise.”<sup>166</sup> These are the same sentiments shared by opponents of the Northern Pass today.<sup>167</sup> The Cree, the Innu, and now North Country residents are “united by the losses they face.”<sup>168</sup>

### Identifying the Victim

To examine the Northern Pass Project through a criminological lens, it is important to first identify the victim. American sociologist, writer, and criminologist Richard Quinney argues that “[b]y the social construction of law itself, *all* crimes have a victim. Acts, in fact, are defined as criminal because someone or something is conceived of as a victim.”<sup>169</sup> Quinney argues that the conception of the victim actually *precedes* the definition of an act as criminal.<sup>170</sup> If a crime is “any social harm defined and punishable by law,” then “social harm” only relates to harm that threatens the state’s social order.<sup>171</sup> “While every act may conceivably involve a victim, *only those acts that threaten the welfare of the ruling class become crimes. Social harm, no matter how abstract, is a reality decided upon by those in power.*”<sup>172</sup>

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162. Mansfield, *supra* note 141.

163. *Hydro-Quebec and the Cree Case Study*, UNIV. OF VA., <http://faculty.virginia.edu/ejus/Hydro.htm> [<https://perma.cc/9XC6-72WR>].

164. *Id.*

165. Mansfield, *supra* note 141.

166. *Id.*

167. *Id.*

168. *Id.*

169. Richard Quinney, *Who is the Victim*, 10 CRIMINOLOGY 314, 315 (1972).

170. *Id.*

171. *Id.*

172. *Id.* (emphasis added).

It is no surprise, then, that the less-affluent North Country residents, as well as the Cree and Innu, are not in a position to decide the reality of social harm. Brad Thompson, a resident of Clarksville, bought his property next to Coleman State Park in 2014.<sup>173</sup> He had heard about the Northern Pass but thought he would never have to worry about seeing the line near his property due to its proximity to the Coleman State Park.<sup>174</sup>

If any other home owner or small business wanted to put transmission lines, or even a sugar line, that close to a state park, there's no way that the state would ever allow it, under any circumstances. And to think they're even considering it, makes you wonder, who's in whose pocket.<sup>175</sup>

John Harrigan, also noted, "if they were proposing this kind of thing anywhere near Concord, through a landscape like this, people would be out with torches and pitchforks by the thousands."<sup>176</sup> There's no denying this. Similar electric transmission line projects that run through other New England states have been buried.

We fight for the same respectful treatment that other states are demanding and receiving from energy developers. Northern Pass insists that the transmission lines are too expensive to place underground. We in New Hampshire are flummoxed by this claim. We know that in Vermont and New York, Blackstone Group's Champlain-Hudson Power Express project will go under Lake Champlain and then nearly 140 miles underground along roads and rail beds to New York City. We know Maine has created a utility corridor along some of its highways where a project called Northeast Energy link plans to go underground. Of comparable size and length to Northern Pass, both are private projects slated to deliver a nice return on investment.<sup>177</sup>

This idea of a "lack of respect" permeates the North Country. John Harrigan, during his interview in a twenty-one-minute educational video on the Northern Pass, said the same. "Hydro-Quebec, and Public Service, now Eversource, are demonstrating by this project a lack of respect for the state we all love. It's a heck of a way to manifest it by ramming a private, for-profit power line down through country like this. That demonstrates no respect for the New Hampshire we're

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173. Tim Shellmer, *Negative Impacts of the Northern Pass Transmission Line*, YOUTUBE (Nov. 19, 2016), <https://www.youtube.com/watch?v=mAR2X846IEA> [<https://perma.cc/3DXQ-GCPH>].

174. *Id.*

175. *Id.*

176. *Id.*

177. Martland, *supra* note 112.



supposed to love. Look around here,” He pauses to stare out at the land, “[t]his is no way to treat New Hampshire.”<sup>178</sup> John also pointed out that Eversource told them “time and time again” that they were only going to be using existing rights of way. Now they will be creating forty new miles of right-of-way through “pristine, pastoral forests, with a thirty-five-mile view.”<sup>179</sup> He followed up, “for some reason they didn’t put that in the promotional material.”<sup>180</sup>

The residents of Northern New Hampshire are being sacrificed for private gain. Many speculate that if this project were proposed in Connecticut or Massachusetts, two of the wealthier states in New England that are receiving the line’s power, it would likely not go forward. “Would the people of Connecticut allow its landscape to be defaced and private property and public land degraded by an unneeded project like Northern Pass? Somehow I doubt it.”<sup>181</sup> New Hampshire residents hope to convince their New England neighbors to reconsider support for the Northern Pass. “We ask our Connecticut neighbors, who know our state and love to visit it, to take a short walk in our shoes and ask yourself if you would sit by and let Connecticut’s precious places be sacrificed for corporate profit. Then perhaps you will see why we fight.”<sup>182</sup>

If the idea of “the victim” is a social construction, as Quinney concludes, then what does it say about our society that we refuse to regard one class of persons as victims and not others as victims in the same circumstances? In the context of the Northern Pass, the harm to rural, lower-socioeconomic residents of the North Country is valued less than the same harm to wealthy residents of southern New England. We see these kinds of moral inequalities all over our country, especially when it comes to the treatment of Native American Indians and people of color.<sup>183</sup> In the North Country, not only do the residents not need the power, they are unable to use the power. Yet, they will be forced to bear the burden of the towers’ construction. Northern New Hampshire residents are the victims, but only if society deems that their interests have value.

### Defining Environmental Harm

John Stuart Mill, British philosopher and social theorist, suggested that “harm involves “encroachment” on others’ rights, or the injuring of certain interests’ of another, “which, either by express legal provision or by tacit understanding, ought to be considered as rights.”<sup>184</sup> In his work *On Liberty*, he puts forward the “harm principle,” stating that “the only purpose for which power

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178. Shellmer, *supra* note 173.

179. *Id.*

180. *Id.*

181. Martland, *supra* note 112.

182. *Id.*

183. *E.g.*, Dakota Access Pipeline siting; Flint Water Crisis rerouting of water for white, affluent communities, etc.

184. Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, WIS. L. REV. 897, 923 (2006).

can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”<sup>185</sup> Joel Feinberg defines harm to another person as that which “adversely affect[s] his interests.”<sup>186</sup> The term “interests” is defined as “distinguishable components of a person’s good or well-being. What is in a person’s interests is what is good for him or beneficial, and what is against his interests is what is bad for him or harmful.”<sup>187</sup> To illustrate, Feinberg gave factors to illustrate harm:

A harms B when:

A acts (in a sense of “act” broad enough to include acts of omission and extended sequences of activity);

A’s action is defective or faulty with respect to the risks it creates to B, that is, either A intended to produce the consequences for B that follow, or similarly adverse consequences or A was negligent or reckless with respect to those consequences;

A’s action is morally indefensible, that is neither excusable nor justifiable

A’s action is the cause of an adverse effect on B’s self-interest (a “state of harm”); and

The adverse effect which A’s action causes is also a violation of B’s right.<sup>188</sup>

Under this showing, other New England States, like Massachusetts, Connecticut, and Rhode Island are “harming” New Hampshire, as the adverse consequences associated with the Northern Pass’s construction are known in other states. Similarly, the interests of these states adversely impact New Hampshire’s self-interests.

Environmental law, “concerns itself largely with the prevention or correction of harm. Under one view—the view advocated by proponents of the harm principle—harm is a necessary condition for government intervention, whether through criminal prohibition, administrative regulation, or creation of a tort action.”<sup>189</sup>

University of California, Davis, School of Law professor Albert Lin discusses the role of harm in Environmental Law by first noting that it is still a

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185. Colin Heydt, *John Stuart Mill*, INTERNET ENCYCLOPEDIA OF PHIL., <http://www.iep.utm.edu/milljs/> [<https://perma.cc/RND2-28C3>].

186. Joel Feinberg, *Wrongful Conception and the Right Not to Be Harmed*, 8 HARV. J.L. & PUB. POL’Y 57, 58 (1985).

187. *Id.*

188. *Id.* at 50.

189. Lin, *supra* note 184, at 898.

relatively undefined concept, despite being central to environmental law.<sup>190</sup> “Indeed, the appeal of the harm principle derives largely from its apparent simplicity and objectiveness. . . . Harm means different things to different people, and the harm principle often disguises inevitable choices about values.”<sup>191</sup>

“The concept of harm pervades environmental law today. Nuisance actions, the precursors to modern environmental law, require a showing of harm to interests in the use and enjoyment of land.”<sup>192</sup> Certainly, interests such as passing down property to one’s children, property value-diminution, and a religious-like connection to one’s own private property would be a harm to such use and enjoyment of land.<sup>193</sup>

According to Lin, “harm is a normative concept that reflects underlying social judgments about the good and the bad.”<sup>194</sup> Instead of having a fixed meaning, “harm” is “dependent on social judgments about the interests that matter, bound up in visions of the good and the bad.”<sup>195</sup> If our society can make a social judgment to determine that the property interests of *all* Americans (and ideally, people of all countries) matter, projects like the Northern Pass would never get off the ground. Despite the economic benefits Massachusetts would receive from the construction of the Northern Pass, those benefits must be weighed and balanced with the harm being done to North Country residents. To destroy untouched land for private commercial gain, falsely paraded as “green” undercuts the liberties that we as a society hold so dearly.

### **The Crimes of the Northern Pass: Criminal Theft and Nuisance Torts<sup>196</sup>**

If “the primary purpose of criminal law is to punish and deter wrongful conduct that has resulted in or is likely to result in harm if allowed to proceed” it is necessary to determine what “harm” is in a particular crime.<sup>197</sup> As discussed in the previous section, harm depends on community norms. “What qualifies as harm rests largely on societal norms about acceptable behavior.”<sup>198</sup>

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190. *Id.*

191. *Id.* at 899–900.

192. *Id.* at 899.

193. *Id.* at 918.

194. *Id.* at 901.

195. *Id.* at 984.

196. Criminal trespass could also be applied to this project; however, criminal theft and public/private nuisance have more interesting philosophical analyses. Criminal trespass is defined under Section 635:2: “A person is guilty of criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or remains in any place. N.H. REV. STAT. § 635:2 (2015).”

197. Lin, *supra* note 184, at 925.

198. *Id.* at 932.

### *Theft*

According to the New Hampshire Criminal Code “theft by unauthorized taking or transfer” is defined as a person obtaining or *exercising unauthorized control over the property of another with a purpose to deprive him thereof*.<sup>199</sup> To “obtain or exercise unauthorized control” under the statute includes, but is not necessarily limited to, conduct defined or known as common law larceny by trespassory taking, larceny by conversion,” etc.<sup>200</sup>

According to the statute, “property” is defined to include “anything of value, including real estate, [and] *tangible and intangible* personal property . . .”<sup>201</sup> In order for a crime to be considered theft, there must be intent, a “purpose to deprive,” meaning, to have the conscious object “(a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or (b) To restore the property only upon payment of a reward or other compensation; or (c) To dispose of the property under circumstances that make it unlikely that the owner will recover it; or (d) To appropriate the goods or merchandise of a merchant without paying the merchant’s stated or advertised price.”<sup>202</sup>

New Hampshire also has a “Theft by Deception” statute, which states that a person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof.<sup>203</sup> Under the statute, deception occurs when a person purposely:

- (a) Creates or reinforces an impression which is false and which that person does not believe to be true, including false impressions as to law, value, knowledge, opinion, intention or other state of mind . . .
- or (b) Fails to correct a false impression which he previously had created or reinforced and which he did not believe to be true, or which he knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or (c) Prevents another from acquiring information which is pertinent to the disposition of the property involved; or . . . (e) Misrepresents to or misleads any person, in any manner, so as to make that person believe that the person on whose behalf a solicitation or sales promotion is being conducted is a charitable trust or that the proceeds of such solicitation or sales promotion shall be used for charitable purposes, if such is not the fact.<sup>204</sup>

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199. N.H. REV. STAT. § 637:3 (2014) (emphasis added).

200. *Id.*

201. *Id.*

202. *Id.*

203. N.H. REV. STAT. § 637:4 (emphasis added).

204. *Id.* (emphasis added).

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This Theft by Deception statute on its face speaks to numerous actions taken by Hydro-Quebec and Eversource in their fight to make the Northern Pass a reality. Eversource worked in concert with the Massachusetts Department of Energy Resources to draft the request for proposals for bids on The Energy Diversity Act.<sup>205</sup> Hydro-Quebec and Eversource continue to market the project as “green,” despite reports on their own reservoirs that prove this inaccuracy. These corporations have coerced landowners into selling easements all under the blanket of environmentalism, yet have destroyed thousands of acres of plants, animals, and forests belonging to the Cree and Innu populations.<sup>206</sup> Marketing a project as “clean” and environmentally friendly, with the knowledge that that is not the truth, in order to make billions of dollars on an elective project seems to fit within the definition of deceit. Further, “a person commits theft under this section notwithstanding that the victim has suffered no actual or net pecuniary loss” under the statute.<sup>207</sup> This opens the door for plaintiffs that might not be able to show a concrete injury-in-fact, such as loss in property value.

Reduction in property values are a concern for Northern New Hampshire residents. Existing utility rights-of-way reduce property values, and Northern Pass project would amplify the decrease.<sup>208</sup> George Sansoucy, an appraiser and assessor from Lancaster, testified that the existing transmission line he maintains through Hopkinton and Dunbarton has lowered assessments for property owners. “In pre-filed testimony, Sansoucy said the impact on Dunbarton property value could be as high as \$1.6 million, but is probably lower because not all tax cards have the easement reduction listed.”<sup>209</sup> Because the easement goes through the land, the property owner is impaired.<sup>210</sup> Northern Pass’s real estate expert said that the decrease in property value was only \$280,000.<sup>211</sup> Sansoucy argued that “you can discount 25 percent to 40 percent, but not below 50 percent . . . that would go against the historic value.”<sup>212</sup> Additionally the chair of the North Country Scenic Byways Council, Carl Martland, also told the SEC that Northern Pass would have adverse effects along the federally and state designated roads and on the scenic byways Northern New Hampshire is known for. “In the long-term, it is a deterrent to the scenic quality of New Hampshire” Martland said, “to put a gash 200 feet wide that will have a major impact on the scenery of New Hampshire.”<sup>213</sup>

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205. Norton, *supra* note 46.

206. See *Is Quebec “Clean” Really “Green”?*

207. N.H. REV. STAT. § 637:4.

208. Garry Rayno, *Northern Pass and Opponents Spar Over Project’s Property Value Impact*, INDEPTHNH (Nov. 21, 2017), <http://indepthnh.org/2017/11/21/northern-pass-and-opponents-spar-over-projects-property-value-impact/#> [<https://perma.cc/QF7K-C7L3>].

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. Rayno, *supra* note 208.

North Country residents will be denied the “use and benefit” of their property if the Northern Pass is constructed. Due to the sheer size and number of these towers, even if the towers are not directly on one’s land, they will be seen from miles away, not only negatively impacting the property value, but also taking away that intangible, spiritual relationship that these residents have with their land.

Although the idea that the construction of Northern Pass would constitute theft of North Country residents’ spiritual relationship is novel; the unsightliness of powerlines has been held as an element of damages in easement condemnation proceedings. While the Northern Pass is not an easement by condemnation, due to New Hampshire’s protection against eminent domain and takings by public utilities companies, the actions taken by Eversource would be comparable with those taken in easement condemnation cases. Courts have upheld that aesthetic losses are proper, especially on farmland, residential land, and land used both as a farm and as a residence.<sup>214</sup> “Aesthetic loss due to installation of an electric power transmission line on farmland was held properly allowed in *United States ex rel. Tennessee Valley Authority v. Easement & Right of Way*, etc. (1964, CA6 Ky) 336 F2d 76.”<sup>215</sup> In *Union Electric Co. v. Simpson*, an electric company brought a condemnation action to acquire a perpetual easement for high-voltage electric transmission line, the court held that the jury had the right to consider any effect that powerlines might have on market value of the property and should consider every effect that resulted from the taking, and from the structures installed, “that would influence an intended purchaser’s estimate of the market value of the subject property.”<sup>216</sup>

In *Central Illinois Public Service Co. v. Westervelt*, damages were also considered on the remainder of a landowner’s land not taken for an easement because “the presence of the high-voltage electric transmission lines and supporting structures would be unsightly and would reduce the market value of his remaining land because the public would be less willing to buy residential tracts there.”<sup>217</sup>

Further, even the fear of a powerline or related structure has also been held as an element of damages in easement condemnation proceedings in some jurisdictions. In *Evans v. Iowa Southern Utilities Co.*, the court held that the court could consider a prospective purchaser’s fear of a high-voltage powerline in the computation of damages resulting from condemnation.<sup>218</sup> The court in *Criscuola v. Power Authority*, went even further, finding that there should be no requirement that “claimant, as a component of its market value proofs, must establish reasonableness of fear or perception of danger or health risks from exposure to

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214. *Unsightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding*, 97 A.L.R. Fed. 3d 587 (1980).

215. *Id.*

216. *Id.* (citing *In Union Electric Co. v. Simpson*, 371 SW2d 673 (1963)).

217. *Id.* at n.15.

218. Vitauts M. Gulbis, *Fear of Powerline, Gas or Oil Pipeline, or Related Structure as Element of Damages in Easement Condemnation Proceeding*, 23 A.L.R. Fed. 4th 631 (1983).

high-voltage power lines . . . this consequence may be present even if public's fear is unreasonable."<sup>219</sup> Similarly, in *Western Farmers Elec. Co-op. v. Enis*, property owner could recover compensation for loss in value of property of high voltage electric transmission lines erected on property "based on fear of dangers posed by lines without proving the reasonableness of the fear."<sup>220</sup> Even in cases where the condemner had conducted studies which indicated that the apprehension of injuries from powerlines was not well founded, courts have held that, "since market values could be affected by unfounded apprehensions concerning powerlines, an allowance of incidental damages for such fears was reasonable and proper."<sup>221</sup>

Untouched North Country land should not be tarnished with huge electrical towers and transmission lines. To the residents of the North Country, the Northern Pass line would represent a theft of one of the only things they own. As dairy farmer Rod McAllaster remarked when looking at his land,

I've seen [this view] every day for 60 years and I'm not sick of it. That's the way I feel about it. I'd rather be here looking at this view than I would somewhere else doing something that actually made money. I don't make any money here, but we've been able to stay here. That's all I ask for: just to get by and hold onto this property that's been in the family. It's important, and there's a lot of history here. You start wrecking it and the history goes with the wreckage.<sup>222</sup>

For those in the North Country that consider themselves people of the land, building the transmission line and destroying the landscape is like "putting a Walmart on the rim of the Grand Canyon. You just don't do it."<sup>223</sup>

For people like McAllaster, the line's construction will cut off his route to deliver milk from his dairy farm, which he must do every other day.<sup>224</sup> The roads in New Hampshire are narrow and winding. Northern Pass told McAllaster that there would always be one lane open on the two-lane road, but he has since learned that it might be closed for long periods of time.<sup>225</sup>

Lost profits and diminution of property value are not why the people of the North Country fight against the Project, although these concrete injuries help their case. North Country residents fight against the Project because it will desecrate the land they love. Society, however, will only acknowledge them if there is money to be found.

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219. *Id.* (citing *Criscuola v. Power Authority* (1993) 81 NY2d 649).

220. *Id.*

221. *Id.*; *U.S. ex rel. & for Use of Tennessee Val. Auth. v. Easement & Right of Way Over a Tract of Land in Madison Cty., Tenn.*, 405 F.2d 305 (6th Cir. 1968).

222. *Mansfield*, *supra* note 141.

223. *Shellmer*, *supra* note 173.

224. *Id.*

225. *Id.*

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The question of why our society refuses to recognize private for-profit exploitation of private and public land as theft all comes down to our societal values. As Quinney noted, only that which diminishes the interests of those in power value becomes criminal.<sup>226</sup> But how can you convince someone to care about other people, or to care about the destruction of the natural world that you consider sacred? These questions lie at the heart of defining societal harms, and defining crime. Only when we understand our own value judgments can we collectively change the narrative regarding what constitutes a crime.

### *Nuisance*

In general, a nuisance is defined as a “condition, activity, or situation . . . that interferes with the use or enjoyment of property; especially a non-transitory condition or persistent activity that either injures the physical condition of adjacent land or interferes with its use or with the enjoyment of easements on the land of public highways.”<sup>227</sup> A nuisance is a tort, and so examining the Northern Pass as such does not rise to the standard of a crime, however, because much of environmental law can be traced to nuisance torts, an examination of nuisance is significant.<sup>228</sup>

The origins of environmental law can be traced to tort law, particularly the law of nuisance. Nuisance protects a plaintiff from nontrespassory, intangible interference with one’s use and enjoyment of land. In contrast to much of the rest of tort law, nuisance is not terribly concerned with the degree of fault in a defendant’s conduct. The focus of nuisance law, rather, is on whether there is significant harm—that is, significant interference with one’s use and enjoyment of land or significant impairment of public rights.<sup>229</sup>

When an interference “substantially and unreasonably affects the use and enjoyment of a single or small group of properties it is considered a private nuisance,”<sup>230</sup> however, when an activity unreasonably interferes “with a right common to the general public,” it is considered a public nuisance.<sup>231</sup> In the context of the Northern Pass, if the project is approved on appeal and the towers are erected, private landowners should be able to sue under private nuisance for the lines that

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226. Quinney, *supra* note 169, at 315.

227. NH PUB. HEALTH NUISANCE TASKFORCE & NETWORK FOR PUB. HEALTH L. EASTER REGION, PUBLIC HEALTH NUISANCE GUIDANCE DOCUMENT (NH Health Officers Ass’n NH Division of Pub. Health Servs., & Network for Pub. Health L. eds.) (2014), <https://www.dhhs.nh.gov/dphs/holu/documents/hom-nuisance-guidance.pdf> [<https://perma.cc/2UFM-J6DR>].

228. Lin, *supra* note 184, at 903–04.

229. *Id.*

230. *Dunlap v. Daigle*, 122 N.H. 295, 298 (1982).

231. *Robie v. Lillis*, 112 N.H. 492, 495 (1972).



traverse their property. Although Northern Pass would likely argue that the lines crossing one's property does not rise to the level of "substantial" nor "unreasonable," due to the permanence of the lines and towers, it likely would. To determine unreasonableness, the gravity of the harm must outweigh the utility of the actor's conduct, looking to factors such as the extent and character of the harm, the social value attached to the type of use or enjoyment invaded, the cost to the person harmed, and the character of the locality invaded.<sup>232</sup> However, because the Northern Pass traverses many state and national forests as well as conserved lands that are frequented because of their beauty, the project could also be seen to unreasonably interfere with a right common to the general public—that of enjoying the splendor of New Hampshire land.

Because of the wide range of contexts in which it has been applied, the law of nuisance was once described as an 'impenetrable jungle.' The harms that nuisance may encompass include a great variety of negative impacts, such as tangible property damage, diminution in market value, loss of use, loss of light or view, disturbance of a neighbor, or even disturbance of a neighbor's peace of mind.<sup>233</sup>

Nuisance law is not fixed, meaning, the specific harms that nuisance governs changes based on the context of community norms.<sup>234</sup> "Whether a nuisance exists involves a balancing of the gravity of the harm, the utility of the conduct, the location and surroundings of the activity, and other factors that ultimately reflect social value judgments."<sup>235</sup>

The idea that community norms dictate whether a nuisance exists is apparent when one looks at certain harms, such as hazardous waste sites that disproportionately impact communities of color, native people, and/or low-income communities.<sup>236</sup> Living near hazardous waste sites can cause a higher risk of birth defects, neurotoxic disorders, leukemia, cardiovascular abnormalities and other life-threatening ailments.<sup>237</sup> These types of physical harms should undoubtedly constitute a nuisance action (and, ideally, a criminal action); however, between twenty million and forty million U.S. citizens live within four miles of such sites.<sup>238</sup> Most of these populations are people of color, native people, and or low-income communities.<sup>239</sup> Because nuisance claims are judged, based, in-part, on the community that is harmed and the locality that is invaded, low-income urban

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232. Serena M. Williams, *The Anticipatory Nuisance Doctrine: One Common Law Theory for Use in Environmental Justice Cases*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 223, 240 (1995) (citing Restatement (Second) of Torts § 827 (1977)).

233. Lin, *supra* note 184, at 904.

234. *Id.*

235. *Id.*

236. Williams, *supra* note 232, at 230.

237. *Id.*

238. *Id.* at 223.

239. *Id.*

communities that are already bearing the brunt of environmental harms continue to be inundated by environmentally unjust projects. As heartbreaking and unfortunate as this trend is nationally, applying it to the Northern Pass project might actually help North Country residents' make their case to stop the Northern Pass. While it is true, North Country residents—especially those in Coös County—are struggling financially, they are also living in rural, untouched, and unblemished lands. There are other transmission lines in the state, but none of the height nor length proposed by Northern Pass. These facts work to the advantage of Northern Pass opponents to illustrate what a significant intrusion this project would be, based on the character of the locality.

The hope is that because there is a basis to support a nuisance claim against the Northern Pass if it were constructed, that an anticipatory nuisance claim to enjoin the project could stop it before it begins. The higher prices of electricity in New England should not be enough to constitute a morally bankrupt project's construction. There is no need for the Northern Pass in New Hampshire. Further, New England is home to some of the best minds and leading developers in the clean energy sector, "particularly when it comes to solar, wind, energy efficiency and conservation."<sup>240</sup> There is no need to cripple the local green tech market for a project that will permanently scar some of the last untouched land in the region.

## Conclusion

Although Northern Pass offers a long-term solution to New England's energy goals, the potential benefits of the Northern Pass Project in no way outweigh the potential harms.<sup>241</sup> The loss and destruction of scenic and historic landscapes, threats to conserved lands and private property rights, and the potentially disastrous impacts to New Hampshire's economy and real estate are incalculable. Further, despite the project's sponsors hailing it as "green," the Northern Pass project could ultimately put "local, clean renewables at risk" by forcing reliance "on big, carbon-emitting Canadian hydropower, undermining the market for New England's own homegrown, zero-carbon renewable energy."<sup>242</sup> There are cleaner, more sustainable local options available for New England that would not permanently scar one the region. The New Hampshire SEC's decision to deny the Project is in the best interest of New Hampshire, and should be upheld. To continue with the project as proposed would constitute a criminal act against New Hampshire's citizens, robbing them of their most sacred and invaluable possession, their land.

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240. Baker, *supra* note 54.

241. This conclusion was also reached by the February 2017 Analysis Group, Inc. report, *The Proposed Northern Pass Transmission Project: Assessing its impacts on New Hampshire*, Analysis Group, Inc. an independent analysis that reviewed the impacts of the Northern Pass Proposal.

242. *Stopping the Northern Pass*, CONSERVATION L. FOUND., <https://www.clf.org/making-an-impact/stopping-northern-pass/> [<https://perma.cc/K9E2-2QRU>].

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